SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 887

HARMOND E. GENSTIL,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

JOHN L. SALTONSTALL, JR.
HILL, BARLOW, GOODALE & ADAMS
53 State Street
Boston 9, Mass.

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Harmond E. Genstil prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the First Circuit, entered in case No. 6141.

I. Opinion Below

The opinion of the United States Court of Appeals is set forth in Appendix A *infra*, page 19

II. Jurisdiction

Judgment in the instant case was entered by the United States Court of Appeals for the First Circuit on January 13, 1964. There was no order respecting a rehearing. On February 4, 1964, Mr. Justice Goldberg signed an order extending the time to file a petition for writ of certiorari up to and including March 4, 1964. Jurisdiction to review the judgment of the Court of Appeals on writ of certiorari is conferred by United States Code, Title 28, Section 1254(1).

III. Question Presented for Review

Was it prejudicial error for the District Court to fail to follow the mandate of United States Code, Title 18, Section 3500, by not obtaining the production of prior statements made by government witnesses, after defense counsel had seasonably moved for production, when those statements (a) were in existence, (b) were in the possession of the Government, and (c) concerned the subject matter of the witnesses' direct testimony?

IV. Statute Involved

The statute involved in this proceeding is United States Code, Title 18, Section 3500, 71 Stat. 595, 596 (popularly known as the Jencks Act). In full text it provides as follows:

> "§ 3500. Demands for production of statements and reports of witnesses
>
> (a) In any criminal prosecution brought by the United States, no statement or report in the possession

of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial

judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement', as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." (Added by Public Law 85-269, Sept. 2, 1957, 71 Stat. 595.)

V. Statement of the Case

This Petition seeks review of a judgment of the Court of Appeals for the First Circuit, dated January 13, 1964, affirming the judgment of the District Court for the District of Massachusetts, adjudging the Petitioner guilty of the offense of making and filing false statements to a depart-

ment or agency of the United States and sentencing the Petitioner to pay a fine of $3,000 and to be imprisoned for two (2) years.

The alleged false statements concerned the financial condition of the Petitioner and were given orally (T. 9, 113-115) [1] and in writing (Exhibits 2, 4 and 5) to Revenue Agents John J. Ford and Miles P. McCabe, both of whom were called as witnesses by the Government.

Mr. Ford testified that on March 6, 1957, he left a summons addressed to the Petitioner at the Petitioner's home calling upon the Petitioner to appear at the District Office of Internal Revenue in Boston to give testimony before Mr. Ford relating to payment of the Petitioner's liability for back taxes. Mr. Ford testified that the Petitioner appeared before him in compliance with the summons on March 19, 1957, that he talked with him there and that, after some conversation regarding consultation by the Petitioner with his attorney, the Petitioner completed a financial statement in part (Exhibit 2) and left it with Mr. Ford. Mr. Ford further testified as to the data furnished by the Petitioner in those portions of the financial statement which the Petitioner completed.

At the close of his direct testimony, and following a motion by defense counsel that the Government produce any prior statement made by Mr. Ford regarding the subject matter of his direct testimony, Mr. Ford testified in substance that he had made notes of his March 19, 1957, conversation with the Petitioner and that he had given the notes to Mr. McCabe when the latter had succeeded him on the case. Thereupon, after inquiries were made of Mr.

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[1] The abbreviation "T." in this petition refers to the Transcript of testimony in the District Court. The abbreviation "R.A." refers to the Record Appendices as designated by the parties on appeal to the Court of Appeals. The entire record has been filed with this Court pursuant to the provisions of Rule 21(3) of the Supreme Court Rules.

McCabe, the Court instructed Government counsel to produce Mr. Ford's notes "if they are in existence and can be produced". Defense counsel moved that the notes be handed to him before he cross examined Mr. Ford, but the Court ordered defense counsel to continue the examination stating, "we will get the notes at the noontime recess, thirty minutes away." Defense counsel's reply was "I will accede to your Honor's request, subject to my objection." See R.A., Vol. I, 16-18.

Defense counsel continued the cross examination of Mr. Ford until the noon recess (T. 21-46), and most of the afternoon session was devoted to further cross examination of Mr. Ford by defense counsel (T. 47-100). About halfway through the afternoon cross-examination of Mr. Ford, the following exchange took place:

> Mr. Madden: If your Honor please, may I at this time say in the morning session I think Mr. Levine requested that something with relation to notes that this witness made on the back of some papers should be furnished to him. At any rate, your Honor, there has been delivered to me, which might be helpful at this moment to my brother, the papers the man had in his hand and on which he made his notes.
>
> The Court: All right.
>
> Mr. Levine: Do you want me to suspend and look at it now?
>
> The Court: It is up to you. It was delivered to you in accordance with your instruction. You can finish this line.
>
> Mr. Levine: They will continue to be available to me?
>
> Mr. Madden: Yes.
>
> Mr. Levine: Thank you. (T. 69)

On the next trial day the Government called Mr. McCabe, who testified on direct examination concerning a conversation which he had had with the Petitioner on May 3, 1960, at the office of the District Director of Internal Revenue in Boston. Mr. McCabe stated that the Petitioner represented to him that he was on the verge of bankruptcy and wished to file an offer in compromise for about $5,000. Thereafter, according to Mr. McCabe's testimony, he gave the Petitioner blank forms of an offer in compromise and of a statement of financial condition. Mr. McCabe further testified that on May 20, 1960, he received executed originals of the partially completed forms (Exhibits 4 and 5) in the mail.

Following the direct testimony of Mr. McCabe, defense counsel moved that the Government produce any prior statement of Mr. McCabe relating to the subject matter of his direct testimony. After some discussion, Government counsel stated that he did not know whether the Government possessed any such statement or not. After a further colloquy the witness established that he had made prior statements, some of which were in the courtroom and some of which were not. Government counsel requested a short recess in order to search for the other statements, but this was not permitted by the trial judge. Thereafter, following further interrogation of the witness by defense counsel concerning the prior statements, defense counsel moved that Mr. McCabe's testimony be stricken. This motion was denied. See R.A., Vol. I, 21-24.

According to the transcript of testimony, no further reference was made during the balance of the trial to the statements of Mr. Ford and Mr. McCabe which had been requested by defense counsel.

VI. Jurisdiction of District Court

Petitioner was charged with making fraudulent financial statements and offers in compromise, in violation of the Internal Revenue Code of 1954, Sections 7206(1) and 7206(5)(B), United States Code, Title 26, Sections 7206(1) and 7206(5)(B). United States Code, Title 18, Section 3231 grants original jurisdiction of all offenses against the laws of the United States to the United States District Courts.

VII. Argument

A. The District Court Should Have Required the Government to Produce Prior Statements of Witnesses Ford and McCabe.

1. *The Four Statutory Prerequisites for Obtaining Production of Prior Statements.*

The Jencks Act (United States Code, Title 18, § 3500) provides that in any criminal prosecution brought by the United States the defendant may require production of prior statements or reports made by any witness for the prosecution provided four conditions are met, as follows:

(a) A Government witness must have testified on direct examination;

(b) There must be some showing that the witness made a prior statement (as defined by § 3500(c)) to an agent of the Government, which statement related to the subject matter of the witness' testimony on direct examination;

(c) There must be some showing that such statement is in the possession of the Government, and

(d) A motion to produce the statement must be made by the defendant.[2]

2. *The Four Statutory Prerequisites Were Met in This Case.*

(a) The Authors of the Prior Statements Had Testified on Direct.

It is undisputed that Messrs. Fords and McCabe testified on direct examination as witnesses for the prosecution. R.A., Vol. I, 15-16, 20-21; T. 6-18, 112-117.

(b) The Statements Were Producible Under the Act.

The fact that both witnesses made prior statements relating to the subject matter is also undisputed. R.A., Vol. I, 17, 22-23. No question has been raised by the Government that the reports of Ford and McCabe, themselves Government agents, were not made to "an agent of the Government" within the meaning of §3500 (a). In any case, this potential problem appears to have been resolved by several decisions of this Court involving prior statements made by Government witnesses. See, e.g., *Clancy* v. *United States*, 365 U.S. 312, 314 (1961); *Campbell* v. *United States*, 373 U.S. 487 (1963). Moreover, both Government witnesses admitted on cross examination that their notes related to the subject matter of their respective testimony on direct examination, (R.A., Vol. I, 17, 22), and there appears to be no question that these notes constituted "statements" as defined in §3500(e)(1).

(c) There Was Adequate Showing that the Statements Were in the Government's Possession.

In view of the undisputed testimony that the desired prior statements were in the possession of the Govern-

[2] For a less detailed analysis of the statutory requirements see *Campbell* v. *United States*, 365 U.S. 85, 86-87 (1961).

ment at and after the time that they were made (R.A., Vol. I, 17, 24), it seems clear from the decision of this Court in *Campbell* v. *United States*, 365 U.S. 85 (1961)[3] that an adequate preliminary showing of possession by the Government at the time of the trial was made by the defendant here. In *Campbell* defense counsel, on cross examination of one Staula, a Government witness, established that prior to the trial Staula had been interviewed by the F.B.I., that the F.B.I. agent had made notes of the interview, that he had read the notes back to Staula at the end of the interview and that Staula had told the agent that his notes were substantially accurate. Although the prosecuting attorney represented to the Court that he did not have any such notes or statement in his possession, "and I do not know whether they ever existed." (p. 92), this Court stated that "the petitioners' cross-examination of Staula had shown a *prima facie* case of their entitlement to a statement, and, at the least, the judge should have required the Government to come forward with evidence to answer that case." 365 U.S. 85, 96.

(d) Adequate Motions to Produce Were Made.

Finally, it seems obvious from a review of the cases construing the Jencks Act that a sufficient motion to produce was made by defense counsel. R.A., Vol. I, 16-17, 21. It is not necessary, of course, that any set formula be followed in such a motion. *United States* v. *Aviles*, 315 F.2d 186, 191 (C.A. 2d, 1963), cert. granted and case remanded sub. nom: *Evola* v. *United States*, 84 S. Ct. 24 (1963). It is sufficient that the defense make it clear to the Court that it wants to see any prior statements or reports. *Howard* v. *United States*, 278 F.2d 872 (C.A.D.C., 1960).

[3] Generally referred to as *Campbell* I. C.f. *Campbell* v. *United States*, 373 U.S. 487 (1963) (*Campbell* II).

It is quite apparent that the trial judge was well aware of the significance of the motions made by Mr. Levine at the start of his cross-examinations of Ford and McCabe. Mr. Ford testified that he had made some notes "on the back of our account tape" concerning his conversation of March 19, 1957, with the defendant, and that he had last seen these notes in 1957 when he gave them to Mr. McCabe, at which time the latter took over responsibility for handling the case. On this showing the trial judge instructed Government counsel to produce Mr. Ford's notes "if they are in existence". R.A., Vol. I, pp. 17-18. In fact it appears that Government counsel actually produced certain notes for defense counsel towards the end of the latter's cross-examination of Mr. Ford, although Government counsel was so vague as to what was being produced, and why, that it is difficult to ascertain from the transcript whether full compliance with the requirements of the Jencks Act was undertaken by the Government and the Court in respect to Mr. Ford's notes. See T. 69. In any case, there is manifestly no problem with regard to the adequacy of defense counsel's motion.

In the case of the motion made by defense counsel for production of the notes made by Mr. McCabe, the trial judge felt impelled to explain to the prosecuting attorney that defense counsel had just "moved in the exact words of Section 35-B[4] for a statement". (R.A., Vol. I, 21). Accordingly, there can be little doubt that defense counsel sufficiently alerted the Court and the Government as to what was desired and therefore that his motion to produce was entirely adequate. *Ogden* v. *United States*, 303 F.2d 724, 733 (C.A. 9th, 1962).

[4] *Sic.* No doubt the intended reference was to §3500(b).

3. The District Court did not Acquit its Affirmative Obligation under the Jencks Act by a Mere Order to Produce.

The petitioner contends that the District Court failed to measure up to its affirmative duty under the Jencks Act to obtain for the defendant the production of any prior statements of Government witnesses which might aid defense counsel in cross-examination. Specifically, the Court failed adequately to protect the defendant in the case of Mr. Ford and, more especially, in the case of Mr. McCabe.

Taking Mr. McCabe's situation first, it appears that following the trial judge's warning to Government counsel that defense counsel had invoked the provisions of §3500, Government counsel looked through his file and produced some papers which he showed to Mr. McCabe. Mr. McCabe identified some of the notes on these papers as being in his handwriting and in reference to his just concluded direct testimony. R.A., Vol. I, 22-23. Apparently these papers were then handed to defense counsel. However, it developed that in addition to these papers there were additional prior statements of the witness which the prosecuting attorney did not have in the courtroom. He therefore requested the Court for a brief recess in order to permit himself an opportunity to obtain the missing notes. However, the Court decided that defense counsel should be given such notes as were already available in the courtroom, intimating that further inquiry as to the additional documents would be made later[5] by the Court. R.A., Vol. I, 23-24.

That further inquiry was never undertaken by the Court. What happened was that after cross-examination of Mr. McCabe, (during which Mr. McCabe admitted that he had made "notes with respect to Harmond Genstil, his tax

[5] The Court's precise words, addressed to defense counsel, were "take what he has and we will find out". (R.A., Vol. I, 23).

liability, his offer of compromise, his statement of financial condition and other information," and that such notes were not among the papers which had been handed to defense counsel), the defense moved that Mr. McCabe's testimony be stricken. This motion was denied. (R.A., Vol. I, 24). No further reference was made by the Court during the entire balance of the trial to the statements of Mr. McCabe desired by the defendant.

No doubt, if the motion to strike should have been taken literally, it was properly denied, inasmuch as the situation was not ripe for invocation of §3500(d), the only part of the Act which provides for motions to strike. Nevertheless, defense counsel's motion to strike should have been taken as a signal by the Court (if it was in any doubt about the matter) that the defendant was not satisfied as to the documents produced by the Government in response to the defendant's motion to produce.

When a defendant seeks the production of a statement as defined in the statute, the District Court has an affirmative duty to determine whether a prior statement was made and whether it is in the possession of the Government and, if so, to require the production of the statement. *Saunders* v. *United States*, 316 F.2d 346, 349 (C.A.D.C., 1963). It is the Court's responsibility to follow the matter through to completion when the defense has raised the question. *United States* v. *Keig*, 320 F.2d 634, 637 (C.A. 7th, 1963). The command of the statute is designed to further the fair and just administration of criminal justice, *Campbell* v. *United States*, 365 U.S. 85, 92 (1960); and this can only be accomplished in such a case as this in the manner stated by the Courts in *Saunders* and *Keig*—i.e., by requiring the judge to do all in his power to see that the defendant gets statements to which he is entitled. By not pressing Government counsel for the production of the McCabe statement—in-

deed, in discouraging the Assistant United States Attorney from going to find the statement—the judge failed in his duty under the statute.

Moreover, the Court failed in its Jencks Act obligations in the case of Mr. Ford as well, in that the trial judge made no attempt at any time to ascertain whether the mysterious, undescribed documents handed to defense counsel by the prosecuting attorney during the afternoon of the first trial day constituted all of the prior statements made by Mr. Ford.

B. The Court of Appeals' Failure to Require the District Court to Carry Out its Affirmative Duty Constitutes Reversible Error.

1. *The Harmless Error Doctrine is Inapplicable Here.*

The harmless error doctrine, first announced by this Court in *Rosenberg* v. *United States*, 360 U.S. 367 (1958), is inapplicable to the facts in the case at bar, since, both as to McCabe and Ford, the errors involved failure by the trial judge reliably to require Government production of all prior statements of the witnesses which were germane to their testimony. Inasmuch as we are concerned with statements which have not been produced, and the contents of which are therefore unknown to the Courts and the defendant, the process of assessment inherently required to apply the harmless error rule cannot be undertaken and therefore the rule cannot be utilized.

If the logic of this reasoning should fail to strike the Court as sufficiently compelling, it is relevant to note that every one of the cases in which the harmless error doctrine has been applied has involved a situation where the re-

viewing court could see that the error was harmless,[6] and that the United States appears to regard petitioner's point respecting application of the harmless error doctrine as sound, judging from the position taken by the Solicitor General in *Killian* v. *United States*, 368 U.S. 231, 239-243.

There is a suggestion in the Government's brief in the Court of Appeals (Government Brief at p. 15) that the deficiencies in the trial judge's performance in regard to Jencks questions may have been harmless error. The direct testimony of revenue agents Ford and McCabe" said the Government's brief "was minimal; so were the notes on the back of the account tapes they were given to collect". It is quite true that the direct testimony of Messrs. Ford and McCabe was short, but both of them testified that they had been the points of contact for the Government to receive the allegedly false statements for which the defendant was prosecuted, and it is by no means inconceivable that the missing notes of the revenue agents might have an important bearing upon the attendant circumstances in which, or upon the motives with which, the defendant's statements were made. Perhaps it is unlikely that this is the case, but nobody really knows. Or at least neither the defendant nor the Court knows. Thus, even if it were to be conceded, *arguendo*, that the chances are not great that the notes of McCabe and Ford when produced will prove to be useful in impeaching their testimony, it would be improper to allow

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[6] *Rosenberg* v. *United States*, 360 U.S. 367 (1958); *Leach* v. *United States*, 320 F.2d 670 (C.A.D.C., 1963); *United States* v. *Allegrucci*, 299 F.2d 811 (C.A. 3d, 1962), cert. den. 372 U.S. 954 (1963); *Ogden* v. *United States*, 303 F.2d, 724 (C.A. 9th, 1962); *United States* v. *Annunziato*, 293 F.2d 373 (C.A. 2d, 1961), cert. den. 368 U.S. 919 (1961); *Karp* v. *United States*, 277 F.2d 843 (C.A. 8th, 1960), cert. den. 364 U.S. 842 (1960); *United States* v. *LaRocca*, 219 F.S. 53 (D.C.W.D. Mo., 1963).

this matter to remain in its present posture. As Circuit Judge Pope said recently in a cognate situation:

> "Perhaps the chances are only one in ten thousand, but since I believe that never, if we can possibly avoid it, should any man stand convicted where plain error occurs, I think we have taken here the only step that will make certain that appelant is assured a fair trial." (Concurring opinion in *Brown* v. *United States*, 314 F.2d 293, 296-297 (C.A. 9th, 1963).)

2. *The* KILLIAN *Procedure Should Have Been Followed.*

This Court, in *Killian* v. *United States*, 368 U.S. 231, 244, (1961) established a procedure that should have been followed by the Court of Appeals in this case. The Jencks Act problem in that case concerned the nonproduction of statements of two government witnesses. As to one set of notes, the Solicitor General represented that they were no longer in existence, and as to the other set of notes, the Solicitor General represented that all of the information contained in the producible statements was already in the hands of the defense. From the material at hand, this Court could not determine whether or not these representations were true. (pp. 239, 241.) Accordingly, the judgment of the Court of Appeals was vacated and the cause remanded to the District Court for a hearing to determine if the Solicitor General's representations were correct. If they were correct, then harmless error had been committed and a new final judgment was to be entered on the record as supplemented by the new findings. If, however, the representations were untrue in any material respect, a new trial should be granted.

The Court of Appeals for the First Circuit should have employed the *Killian* procedure and remanded the case to

the District Court with instructions to inquire into the existence and nature of prior statements of Messrs. Ford and McCabe not produced at the trial, for clearly this procedure has been established as standard operating procedure. *Killian* v. *United States*, 368 U.S. 231 (1961); *Saunders* v. *United States*, 316 F.2d 346 (C.A.D.C., 1963); *Hilliard* v. *United States*, 316 F.2d 150 (C.A.D.C., 1963); *United States* v. *Chapman*, 318 F.2d 912 (C.A. 2d, 1963); *United States* v. *Keig*, 320 F.2d 634 (C.A. 7th, 1963). Failure by the Court of Appeals to follow this procedure was reversible error.

C. Certiorari Should Be Granted.

1. *Summary of Decisions of United States Supreme Court Ignored by Court of Appeals.*

This Court has said that whether the Jencks question is that of harmless error or producibility of statements, where the statements at issue are not before the reviewing court the proper procedure is to remand the case to the District Court to have that court make a determination of the issue. *Killian* v. *United States*, 368 U.S. 231 (1961); *Campbell* v. *United States*, 365 U.S. 85 (1961).

By failing to follow that procedure in this case, the Court of Appeals for the First Circuit has ignored the mandate of this Court.

2. *Summary of Conflicting Decisions in other Circuits.*

(a) Remand

The District of Columbia Circuit, in *Saunders* v. *United States*, 316 F.2d 346 (1963), and in *Hilliard* v. *United States*, 316 F.2d 150 (C.A.D.C., 1963), has followed the

procedure of this Court in *Killian* and *Campbell* and has remanded the cases to the District Court for a determination of whether prior statements should have been produced and, if so, whether only harmless error has been committed. The Second and Seventh Circuits have gone beyond the *Killian* procedure in that they have remanded to determine whether statements should have been produced, instructing reversal to be entered if error should be found. *United States* v. *Chapman*, 318 F.2d 912 (C.A.2d, 1963); *United States* v. *Keig*, 320 F.2d 634 (C.A.7th, 1963).

(b) Affirmative Duty of District Courts.

In *Saunders* v. *United States*, 316 F.2d 346 (C.A.D.C., 1963); *Hilliard* v. *United States*, 317 F.2d 150 (C.A.D.C., 1963) and *United States* v. *Keig*, 320 F.2d 634 (C.A.7th, 1963), the cases were remanded to the respective District Courts involved because the trial judges had not taken the affirmative steps of exploration and double checking to assure that the defendants involved were afforded their full rights under the Jencks Act.

By failing to require the District Court to shoulder such an affirmative duty in this case, the Court of Appeals for the First Circuit finds itself in conflict with the District of Columbia and Seventh Circuits.

Respectfully submitted,

John L. Saltonstall, Jr.
Hill, Barlow, Goodale & Adams
53 State Street
Boston 9, Mass.

Appendix A

United States Court of Appeals
For the First Circuit

No. 6141.

HARMOND E. GENSTIL,

DEFENDANT, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

Joseph E. Levine for appellant.

William C. Madden, Assistant U. S. Attorney, with whom *W. Arthur Garrity, Jr.*, United States Attorney, was on brief, for appellee.

OPINION OF THE COURT.

January 13, 1964.

HARTIGAN, *Circuit Judge*. This is an appeal from a judgment of the United States District Court for the District of Massachusetts, entered April 15, 1963, following a jury verdict, convicting the defendant-appellant Harmond E. Genstil on all three counts of an indictment which charged him with making and filing false statements in violation of 26 U.S.C. §§ 7206(1) and 7206(5)(B).[1] He was sentenced for a period of two years and fined $3,000.

[1] "§ 7206. *Fraud and false statements.*

"Any person who —

"(1) *Declaration under penalties of perjury.* — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the

The first count charged that the defendant on or about March 19, 1957, falsely stated that he did not do business with banks or other financial institutions and that he did not have receipts or disbursements during the preceding twelve months.

Count two charged that on or about April 1, 1960, the defendant falsely stated that he did not own directly or indirectly any assets; that he had liabilities of only judgments totaling $2,250, and that the only assets he had disposed of for less than full value from January 1, 1942 to April 1, 1960 was real estate at 36 Greylock Road, Newtonville, Massachusetts.

The third count charged that on or about May 10, 1960, the defendant falsely stated that he had no assets.

The first question is whether there was substantial evidence to support the verdict. On December 31, 1954 the defendant accepted as correct and agreed to pay an overassessment for taxes owed by him for the years 1942 through 1945. On August 1, 1956, his account at the Internal Revenue Service showed a liability for these taxes plus penalty and interest in the total amount of $72,642.79. His account also bore the entry "No Record of accounts for 1946 through 1959."

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penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

. . . . . .

"(5) *Compromises and closing agreements.* — In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully —

> "(B) *Withholding, falsifying and destroying records.* — Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

Investigation was commenced by the Internal Revenue Service into the circumstances of the nonpayment of the assessment and the nonfilings of tax returns, and in March 1957 defendant received a summons to appear at the Boston office of the Service. He appeared on March 19, 1957 and was given a four page form to complete entitled "Statement Of Financial Condition And Other Information" by revenue officer John J. Ford. Genstil filled out the form in the office, answering "None" to the following questions:

> "11. Bank or other financial institution with which you do business.
>
> "23b. Give an analysis of receipts for past 12 months. . . ."

On May 3, 1960 defendant voluntarily returned to the Boston office of the Internal Revenue Service and told the chief of the office collection force, Myles P. McCabe, that he was on the verge of bankruptcy and wished to file an offer in compromise under 26 U.S.C. §7122. The defendant was given an Offer In Compromise Form (No. 656) and a Statement of Financial Condition And Other Information Form (No. 433), both of which he took home to complete. Through the completed documents defendant offered to the Commissioner of Internal Revenue $3,580.00 to compromise his $72,642.79 unpaid liabilities for the 1942-45 taxable period. In the compromise form the defendant stated "I have no assets and there is no possibility of becoming established in any way what-so-ever until all Internal Revenue investigations have ceased." Answering the financial statement, defendant wrote "None" to all questions having to do with assets; he admitted to liabilities of only one $2,250 judgment; he stated that the only transfer made by him "except for full value" from January 1, 1942 to April 1, 1960 was real estate at 36 Greylock Road, Newtonville, Massachusetts, which he had transferred to his first wife for $1.00 consideration. Defendant dated the offer

in compromise May 10, 1960 and the financial statement April 1, 1960. Both forms were received by mail in the Boston office of the Service on May 20, 1960.

At the trial evidence submitted to the jury disclosed that between 1947 and January 12, 1953 defendant made a cash gift of $75,000 to $80,000 to Audry L. Taylor, his secretary and farm manager, and later, apparently, his second wife. On July 17, 1955 defendant paid $5,000 in full payment for a farm located at New Durham, New Hampshire, and owned by Harley and Bertha Giles. Title, however, was taken in the name of the defendant's and his second wife's two infant children, Candace Rebecca Genstil and Pamela Robin Genstil. This farm was later accounted for as an asset in the inventory of the estate of the children filed February 4, 1958 with the Probate Court, Stratford County, New Hampshire.

Further evidence disclosed that between September 23, 1957 and March 10, 1958 defendant purchased property in Allentown, New Hampshire, from Harry and Mabelle Oakley paying $1,500 down with the remainder of the $15,000 purchase price due at the closing. The defendant, here, caused title to be taken in the name of Edmond J. and Helen C. Stapleton, who then mortgaged the property to the Manchester Federal Savings & Loan Association to secure a $14,000 note used to complete the purchase, and subsequently on June 14, 1958, transferred the property to the two infant Genstil children subject to the mortgage. This property was added to the inventory of the children's estate by amendment allowed May 26, 1959. On August 27, 1959, in an application for a loan from the Manchester Federal Savings & Loan Association, defendant certified that he held the title to this property.

Further transactions entered into by the defendant during the period covered by the questionnaires and brought to the attention of the jury included the endorsing of a

note in the sum of $3,500 to Industrial Finance Co. on May 28, 1959, which note was paid April 6, 1960; the purchasing of an automobile from Commercial Credit Corporation in Manchester on July 23, 1958 for $1,900 and its subsequent trade-in to Autorama, Inc., for $1,345 on April 27, 1960 in part payment for a 1959 Cadillac purchased the same day.

On the issue of the sufficiency of the evidence the appellate court must view the evidence in the light most favorable to the government's case. *United States* v. *Manton*, 107 F.2d 834, 839 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940). On the basis of the evidence presented to it, the jury could find that the defendant willfully and knowingly answered questions and made statements relating to his financial condition that were false, and that the defendant knew such answers and statements were false when he made them. See *Knowles* v. *United States*, 224 F.2d 168, 171 (10th Cir. 1955). It was not necessary for the government to have actually relied on the false statements; it is sufficient that they were made with the intention of inducing such reliance. *United States* v. *Rayor*, 204 F.Supp. 486 (S.D. Cal. 1962); see also *Brandow* v. *United States*, 268 F.2d 559 (10th Cir. 1959).

In addition to the evidence submitted to the jury, the court admitted, but subsequently struck from the record and withdrew from the jury's consideration, evidence of additional transfers and mortgages of property owned by the defendant and evidence pertaining to the receipt by the defendant of proceeds of fire insurance for the loss of a dwelling and barn situated on property owned by the defendant in Pittsfield, New Hampshire. Fifteen of the twenty-nine stricken exhibits and the testimony of fourteen witnesses which was also stricken related to the proceeds received by the defendant from the multiple insurers of the fire loss. The defendant's refusal to stipulate the total amount of the loss—saving his rights as to admissibility—necessitated the government's presentation of the fifteen

proof of loss statements and drafts as well as the testimony of the fourteen witnesses.

The defendant contends that the trial court did not adequately instruct the jury to avoid consideration of the withdrawn exhibits and testimony. The record discloses otherwise. The court carefully described to the jurors the exhibits and testimony which they were to exclude from their consideration and which, in spite of the large amount of excluded evidence, related to only four transactions of the defendant. The defendant's request that the stricken exhibits and testimony be resubmitted to the jury to further impress upon the jurors what had been withdrawn was refused by the court, stating in the jury's presence:

> "... I think where they have been withdrawn they should not be brought to the jury's mind again. When they retire to consider the case they will consider only those exhibits which go with them to the jury room. That is the only thing they ought to consider. It will be the only thing in front of them."

Finally, in the court's charge, the jury was admonished to base their verdict "on the evidence in the case and on nothing else."

We think these instructions by the trial court were adequate to protect the defendant. The testimony was not such as to leave an indelible prejudice in the minds of the jurors. *Shea v. D. & N. Motor Transp. Co.*, 316 Mass. 553, 55 N.E.2d 950 (1944). The judicial warning was sufficiently strong to correct any initial prejudice the defendant may have suffered upon the admission of the evidence. *Throckmorton* v. *Holt*, 180 U.S. 552 (1900); *Looker* v. *United States*, 240 F.2d 932 (2d Cir. 1917).

We have considered and found without merit other points raised by the defendant.

Judgment will be entered affirming the judgment of the district court.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 887

HARMOND E. GENSTIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court wrote no opinion. The opinion of the court of appeals (Pet. 19-24) is reported at 326 F. 2d 243.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 1964. On February 4, 1964, Mr. Justice Goldberg extended the time within which to file a petition for a writ of certiorari to March 4, 1964.

The petition was filed on March 3, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court complied with the provisions of the Jencks Act relating to production of prior written statements of government witnesses upon motion by the defendant.

STATUTE INVOLVED

Section 3500 of Title 18 of the United States Code, in relevant part, provides:

* * * *

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.
>
> (c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to

the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

* * * *

STATEMENT

After trial by jury, petitioner was convicted on all counts of a three-count indictment charging the filing

of false statements with the Internal Revenue Service in violation of Sections 7206(1) and 7206(5)(B) of the Internal Revenue Code of 1954. He was sentenced to pay a fine of $3,000 and to be imprisoned for two years (R. 4-6).[1] The court of appeals unanimously affirmed his conviction (Pet. 19-24).

The false statements referred to in the indictment (R. 4-6) were two written statements of petitioner's financial condition (Gov't. Exs. 2 and 5) and a third document entitled "Offer in Compromise" (R. 21, Ex. 4). In the offer in compromise (Govt. Ex. 4) petitioner proposed to settle an income tax liability of $72,642.79 for the years 1942 through 1945, as well as any claims for the years 1946 through 1960, for $3,580. In the first financial statement (Govt. Ex. 2) petitioner answered "none" to the question, "Banks or other financial institutions with which you do business." In the other two documents received by the Internal Revenue Service on May 20, 1960, he stated that he had no assets and that the only asset he had disposed of for less than full value, since January 1, 1942, was his home in Newtonville, Massachusetts, which he had transferred to his first wife. The government's evidence showed that he had given between $75,000 and $80,000 in cash to his secretary between 1947 and January 12, 1953 (Tr. 335, 338, 339, R. 56, Supp. R. 48), that he did business with various banks, that he placed assets in the names of his children, and that he owned other assets.

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[1] "R." refers to petitioner's appendix in the court of appeals. "Supp. R." refers to the government's appendix in that court. "Tr." refers to the original transcript.

Two revenue agents testified at the trial, John J. Ford and Myles P. McCabe. The present petition is concerned with requests for their prior statements.

The direct examination of agent Ford[2] was confined to establishing the fact that petitioner came to the office of the Internal Revenue Service pursuant to summons on March 19, 1957, and, on that date, completed the first statement of financial condition (Govt. Ex. 2). It bears a signature, "Harmond E. Genstil," proved by a handwriting expert to be petitioner's (Supp. R. 51-64). Ford gave no testimony on direct examination concerning any oral statements made by petitioner, or any conversation with petitioner, except the following (Tr. 8-10):

> Q. Did Mr. Genstil appear at 174 Ipswich Street on March 19, 1957?
> A. He did, sir.
> Q. Mr. Ford?
> A. Yes, he did.
> Q. Did you see him there?
> A. I did.
> Q. Did you talk with him there?
> A. I did.
> Q. Will you state your conversation, please?
> * * * *[3]

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[2] The direct examination runs from page 6 to page 18 of the transcript, his testimony occupying about four pages, the remainder consisting of colloquies. The record appendices to the briefs in the court of appeals contain numerous omissions, not indicated in petitioner's record appendix. Consequently, the references given here will sometimes be to the original transcript.

[3] Objection by counsel is omitted.

THE COURT: Go ahead, Mr. Ford.

THE WITNESS: I asked Mr. Genstil to complete a financial statement and the reason for that is—

THE COURT: No, we don't want the reason, just the conversation.

THE WITNESS: O.K. To complete a financial statement. He completed it in part and then when he was part way through it he asked if he might call his attorney. I said, "There is no reason why you cannot." He went away, I believe, to a public phone.

THE COURT: He went away.

MR. LEVINE: No.

THE COURT: We don't care what you believe, we want the conversation, what you saw, not what you think.

THE WITNESS: Right. He went away, presumably to make the phone call.

MR. LEVINE: No.

THE COURT: Strike it out.

THE WITNESS. He came back and he took the financial statement that I had in front of me and wrote across the face of it "I have not assets," and he signed it and left it with me. He then left the office.

Q. I show you this paper and ask you whether or not this is the paper that he wrote across the face of it in your presence—

A. It is, sir, right.

In his remaining testimony on direct examination, the witness testified merely that, as to each answer written on the form, petitioner himself wrote it (Tr. 10-18), except only that the agent endorsed it, "On March 19, 1957, at Ipswich Street," to show the date the paper was received (Tr. 18).

On commencing his cross-examination, petitioner's counsel asked if the government had "a statement of this witness" and if so, that it be produced (R. 16-17). The prosecutor asked the witness if he had written any notes of his conversation with petitioner, and the witness said that he wrote them on the back of "our account tape," but that he subsequently delivered them to McCabe, another revenue officer who was then present in court (R. 17-18). On being asked, McCabe said that he did not have the notes with him, and the court ordered that they be produced "at the noontime recess, thirty minutes away," and that meanwhile counsel continue with his cross-examination (R. 18). Counsel acquiesced, "subject to my objection" (R. 18). The transcript (Tr. 18-100) shows that cross-examination occupied almost all the rest of that trial day. During this cross-examination, the prosecutor produced the requested notes and the following colloquy occured (Supp. R. 25):

> MR. LEVINE: Do you want me to suspend and look at it now?
>
> THE COURT: It is up to you. It was delivered to you in accordance with your instruction. You can finish this line.
>
> MR. LEVINE: They will continue to be available to me?
>
> MR. MADDEN: Yes.
>
> MR. LEVINE. Thank you.

The record shows no further requests, on that day, for the production of documents.

On the second day of the trial, McCabe testified on direct examination (Tr. 112-117) that petitioner came

to the revenue office on May 3, 1960, and stated "that he was on the verge of bankruptcy and wished to file an offer in compromise for about $5,000" (Supp. R. 26, Tr. 114). McCabe gave petitioner the compromise form and the financial statement form (Tr. 114), and no further conversation occurred (Supp. R. 26-27). Thereafter, on May 20, 1960, McCabe received the filled-in forms in the mail at the office (Tr. 115, Govt. Exs. 4 and 5).

At the outset of his cross-examination, petitioner's counsel requested that the prosecutor "produce a statement of this witness which is in the possession of the United States Government which relates to this subject matter, to which this witness has testified" (R. 21). The court ordered that any such statement be produced (R. 21-22). The prosecutor explained (R. 22; Tr. 119):

> MR. MADDEN: I gave to my brother yesterday papers that he requested. I believe that there are written statements on these papers that were inserted there by this witness. I think he made these notations, at least some of the notations that are on these papers.

The witness then stated that some of the notations or statements were his. The court instructed him not to read them but "to give it to Mr. Madden for delivery to Mr. Levine" (R. 23).

The prosecutor then asked if the witness had made any other written statements, and the witness answered (R. 23):

> THE WITNESS: There have been a number of different memoranda written in connection with

this case. If the specific question is, Have I written memoranda with respect to this specific offer in compromise, I don't recall that I have.

MR. LEVINE: That is not the question.

THE COURT: That is the question. It is the only thing he testified to on direct examination. Is this the only thing you have written concerning your direct testimony?

THE WITNESS: To the best of my recollection.

THE COURT: Deliver it to Mr. Levine.

Petitioner's counsel received the notes in question, on two sheets (R. 23-24). Counsel asked (R. 24) whether the witness had made "some notes with respect to Harmond Genstil, his tax liability, his offer of compromise, his statement of financial condition and other information that does not appear on two of these?" The witness answered, "I believe I did," but said he was "not sure" where they were. Thereupon petitioner's counsel stated, "I ask that this witness' testimony be stricken," and the court denied the motion (R. 24).

Petitioner's counsel, continuing the inquiry, asked if the witness had made "a memorandum of the substance of that conversation" (of May 3, 1960), and the witness answered that he had not, nor had anyone else to his knowledge (Tr. 123-124).[4] Counsel then proceeded with his cross-examination and made no further requests thereafter concerning the production of prior written statements.

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[4] These pages of the transcript are only partly reproduced (Supp. R. 27).

ARGUMENT

There is no merit to petitioner's contention (Pet. 12-14) that the district court, through lack of diligence, failed to protect petitioner's rights under the Jencks Act. The record shows that the court complied with every request for the production of documents, and petitioner's counsel did not request the court to undertake the further exploration of government files which petitioner now seeks. It is unnecessary to speculate now as to whether the further investigation which counsel could have requested would have uncovered anything useful to petitioner's defense.

The facts already stated clearly show that petitioner now seeks to blame the district court for his own counsel's inaction. Agent Ford acknowledged that he had made certain notes of his conversation with petitioner and those notes were delivered to petitioner's counsel while Ford was still on the stand, undergoing cross-examination. After the notes were delivered, counsel made no further inquiry or request with respect to prior statements (Supp. R. 25), but continued on with his cross-examination until, finally, the witness was excused, neither party having any further questions (Tr. 100).

On the following day, after McCabe testified briefly on direct examination, counsel asked for prior statements, and it was explained that the only notes he had made of his conversation with petitioner were written on some of the same sheets which had been delivered to counsel on the preceding day (R. 22). These

notes were again produced and delivered to counsel (R. 23). When the court asked if these were "the only thing you have written concerning your direct testimony," the witness replied in the affirmative. When counsel suggested that other statements might exist, the court said, "Take what he has and we will find out" (R. 23). Counsel then asked a broad question as to whether the witness had made any notes with respect to petitioner, "his tax liability, his offer of compromise, his statement of financial condition and other information that does not appear on two of these?" When the witness replied that he believed he had but did not know where they were, counsel made no inquiry of the prosecutor and requested no action by the court. Instead, he abruptly moved that the witness' testimony be stricken and the court properly denied the motion. Nor did counsel thereafter at any time ask that anything be produced or that any inquiry be made in search of material of possible use to him in his cross-examination. By further questioning of the witness, however, he elicited testimony that neither the witness, nor anyone else, to the witness' knowledge, had made any memorandum (aside from anything in the notes already delivered) concerning the conversation of May 3, 1960, the subject-matter of the witness' direct examination (Tr. 122-124).

Petitioner, in an attempt to show a dereliction of duty on the part of the court, argues (Pet. 13) that the court should have taken the motion to strike "as a signal * * * that the defendant was not satisfied * * *." He then cites cases (Pet. 13, 18) indicating

that, in given circumstances, a district court has an affirmative duty of inquiry, *viz.*, *Saunders* v. *United States*, 316 F. 2d 346 (C.A. D.C.); *Hilliard* v. *United States*, 317 F. 2d 150 (C.A. D.C.), and *United States* v. *Keig*, 320 F. 2d 634 (C.A. 7). But those decisions are wholly inapposite. In all of those cases defendant's counsel requested further action by the court for the production of documents acknowledged to be in existence, and in each instance the court refused. In *Saunders* the court evidently believed, erroneously, that notes of an interview made by a government attorney are immune from production. In *Hilliard* the court refused to order the production of a police report admittedly available. In *Keig* the prosecutor conceded that he had a general report on the case, written by the witness, but when counsel requested that the court inspect it, the court refused on the theory that an Internal Revenue report recommending the action to be taken in a case is not subject to production.

Here, it appears petitioner was shown every statement required to be produced. If there was any lack of diligence, it must be attributed to petitioner's own counsel, who, at the time, evidently chose to forego any further investigation into government files in a search for material useful for cross-examination. Proper judicial administration does not permit reopening the case on the basis of after-thoughts concerning requests that might have been made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

APRIL, 1964

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